

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Petitioner, who is represented by counsel, filed this petition for a writ of habeas corpus on November 6, 2009. The petition challenges a decision denying parole suitability issued by the Board of Parole Hearings on July 2, 2008. [Memorandum in Support of Petition at 1]. Respondent filed a motion to dismiss the petition on the ground that petitioner has failed to exhaust his state remedies. Petitioner did not file an opposition to the motion.¹

¹ Pursuant to Local Rule 7-12, failure to file an opposition may be deemed consent to the granting of the motion. Therefore, the motion to dismiss also may be granted on the basis of petitioner's failure to oppose the motion.

1 granted unless it appears that the applicant has exhausted the
2 remedies available in the courts of the State." 28 U.S.C. §
3 2254(b)(1)(A); see Duncan v. Henry, 513 U.S. 364, 365 (1995) (per
4 curiam). The exhaustion requirement is satisfied when the substance
5 of a petitioner's federal claim has been fairly presented to the
6 state's highest court. Baldwin v. Reese, 541 U.S. 27, 29 (2004);
7 Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008), cert. denied,
8 129 S. Ct. 2771 (2009). A claim has been fairly presented if the
9 petitioner has described both the operative facts and the federal
10 legal theory on which the claim is based. See Duncan, 513 U.S. at
11 365; Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996).

12 The petition indicates that petitioner has exhausted his state
13 remedies by presenting his claims to the California Supreme Court in
14 case number S160497. [Memorandum in Support of Petition at 1 & Ex. A].
15 The petition in case number S160497, however, was filed in the
16 California Supreme Court on January 31, 2008, five months before the
17 decision petitioner challenges in this federal petition. Contrary to
18 petitioner's contention, the state petition he references challenges
19 a December 6, 2006 parole decision, not the 2008 decision at issue
20 here. Further, reference to the California Supreme Court's docket
21 reveals that petitioner has filed no other petitions in that court
22 after July 2, 2008. Accordingly, petitioner has failed to exhaust his
23 state remedies.

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1 The petition is dismissed without prejudice to its refiling after
2 petitioner exhausts his state remedies.

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4 Dated: 2/20/2010

5 SJO
6 S. James Otero
7 United States District Judge
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